(2)

No. 89-1728

In the Supreme Court of the United States

OCTOBER TERM, 1990

WESTERN FUELS-UTAH, INC., PETITIONER

v.

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government's right to readjust the terms of a federal coal lease is waived if the government has provided the lessee with a notice of intent to readjust before the end of the twenty-year period specified in 30 U.S.C. 207(a), but has not provided the lessee with the proposed terms and conditions of readjustment until after the end of the twenty-year period.

2. Whether *Chevron* deference is due to the Secretary of the Interior's interpretation of the Mineral Lands Leasing Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 895 F.2d 780. The order of the district court (Pet. App. 23a-24a) is unreported. The decision of the Interior Board of Land Appeals (IBLA) is reported at 98 I.B.L.A. 114.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1990. The petition for a writ of cer-

tiorari was filed on May 8, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 1, 1963, the Department of the Interior granted a lease under the Mineral Leasing Act (MLA), 30 U.S.C. 181 *et seq.*, to a predecessor in interest of Western Fuels-Utah, Inc. (Western-Utah) to mine federally owned coal located near Rangely, Colorado. The MLA provided at the time that "[l]eases shall be for indeterminate periods upon condition of diligent development and continued operation of the mine or mines." 30 U.S.C. 207 (1958). The MLA also provided, however, that "readjustment of terms and conditions" of the lease may be made, as determined by the Secretary of the Interior, "at the end of each twenty-year period succeeding the date of the lease." *Ibid.*[1]

The Secretary has issued regulations concerning readjustment of coal leases. As they applied at the end of Western-Utah's first twenty-year term in March 1983, the regulations provided that the government must issue a notice of intent to readjust prior to the expiration of the current twenty-year period. 43 C.F.R. 3451.1(c)(1) (1982). Notice of

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[1] The lease itself incorporated the provision for readjustments, providing that the government reserves:

> [T]he right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period.

Pet. App. 4a.

the proposed terms had to be received by the lessee "as soon as possible after notice that the lease shall be readjusted, but shall not be longer than 2 years after such notice." 43 C.F.R. 3451.1(c)(2) (1982). The readjustment was generally effective 60 days after the lessee received the proposed terms. 43 C.F.R. 3451.2(c) (1982).

2. On May 17, 1982, more than nine months before the lease was subject to the first twenty-year readjustment, the Bureau of Land Management (BLM), Department of the Interior, notified Western-Utah that it intended to readjust the 1963 leases. On May 3, 1983, two months after the end of the twenty-year term, the BLM provided Western-Utah the specific terms to be incorporated in the readjusted lease, including new rental and royalty terms as well as other changes required by MLA amendments that had been enacted in 1976.[2]

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[2] In 1976, Congress enacted the Federal Coal Leasing Amendments Act (FCLAA), Pub. L. No. 94-377, 90 Stat. 1083, which revised the coal leasing provisions of the MLA. Section 6 of FCLAA, 30 U.S.C. 207, replaced Section 7 of the MLA, 30 U.S.C. 207 (1958), and provides in relevant part:

> (a) A coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease. Any lease which is not producing in commercial quantities at the end of ten years shall be terminated. The Secretary shall by regulation prescribe annual rentals on leases. A lease shall require payment of a royalty in such amount as the Secretary shall determine of not less than 12½ per centum of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations. The lease shall include such other terms and conditions as the Secretary shall determine. Such rentals and royalties and other terms and conditions of the lease will be subject

Western-Utah filed objections to the timeliness of the proposed lease readjustment. By decision dated February 7, 1985, the BLM overruled the objections, finding that the readjustment was timely because Western-Utah (1) received notice of the readjustment prior to the anniversary date of the lease, and (2) received notice of terms within two years of the notice of readjustment. On appeal, the IBLA affirmed the BLM's decision in relevant part. 98 I.B.L.A. 114 (1987).

3. Western-Utah sought review of the IBLA decision in the District Court for the District of Columbia, where its case was consolidated with similar cases brought by Peabody Coal Company and Colowyo Coal Company. Pet. App. 6a.[3] The district court granted the government's motion for summary judgment in a brief order (*id.* at 23a-24a), relying on *FMC Wyoming Corp.* v. *Hodel*, 816 F.2d 496 (10th Cir. 1987), cert. denied, 484 U.S. 1041 (1988), and *Coastal States Energy Co.* v. *Hodel*, 816 F.2d 502 (10th Cir. 1987).[4]

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to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended.

Because petitioner extracted coal by means of "underground mining operations," the mandatory 12½% royalty rate was inapplicable to petitioner's lease, and a lower rate was set. Pet. App. 4a.

[3] Peabody and Colowyo have filed a separate petition for certiorari, which is currently pending. See *Colowyo Coal Co.* v. *Lujan*, No. 89-1958.

[4] In granting summary judgment, the district court rejected not only the argument advanced by Western-Utah in this petition, but also separate arguments advanced by the other plaintiffs in the consolidated cases concerning the statutory authority and constitutionality of the readjustments at issue in those cases.

The court of appeals affirmed. Pet. App. 20a-22a. The court held that "*Chevron* [*U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984),] * * * controls our decision." *Id.* at 20a. The court observed that the statutory requirement that a readjustment occur "at the end" of the twenty-year period can bear a number of different interpretations:

> It could mean, for instance, that negotiations concerning the new lease terms should begin on or about the anniversary date of the original lease. It could be intended to govern only the effective date of a readjusted lease, and to impose no requirements as to when the readjusted terms should be determined. In short, we think Congress implicitly delegated to the Secretary the task of determining the timing of the procedures by which he would readjust coal leases.

Id. at 20a-21a.

The court found that the procedure employed in this case was one of a number of ways in which the Secretary could carry out his statutory mandate. By giving Western-Utah notice of readjustment prior to the twenty-year anniversary of the lease and a firm date by which proposed terms would be provided, the procedure precluded Western-Utah from claiming "that it was unfairly surprised by the lease readjustment, or that it took action in reliance on the legitimate belief that its lease would not be readjusted." Pet. App. 21a. The procedure therefore "provides the lessee with what it legitimately needs," and "satisfied the timeliness requirements of the statute." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioner contends that the decision of the court of appeals is in conflict with three Tenth Circuit decisions construing the same provision of the MLA. This contention is mistaken. Two of the decisions cited by petitioner were expressly relied upon by the district court in rejecting petitioner's claim, and, although not cited by the court of appeals in this case, both are in full accord with the court of appeals' decision affirming the district court's judgment. The third case involved fundamentally different issues and therefore creates no conflict with the D.C. Circuit's decision in this case.

a. In *FMC Wyoming Corp.* v. *Hodel*, 816 F.2d 496 (10th Cir. 1987), cert. denied, 484 U.S. 1041 (1988), the plaintiff lessee, like petitioner, received a notice of intent to readjust terms of the lease prior to the twenty-year anniversary date of the lease. 816 F.2d at 498-499. Somewhat later, though still prior to the anniversary date, the Secretary provided the lessee with the proposed terms of the readjustment. *Id.* at 499. Because the lessee objected to the terms and pursued administrative appeals, the terms of readjustment were not conclusively determined until at least a month after the anniversary date. *Ibid.* Rejecting the lessee's argument that final action readjusting the lease terms must be completed prior to the twenty-year anniversary date, the Tenth Circuit held, in terms directly applicable to this case, that "a notice of an intent to readjust terms and conditions of a coal lease given a coal company on or

shortly before the 20-year anniversary date preserves the Department's right under [MLA] and the lease provisions to readjust the terms within a reasonable time thereafter." *Id.* at 500.

In *Coastal States Energy Co.* v. *Hodel*, 816 F.2d 502, 505 (1987), decided the same day as *FMC Wyoming*, the Tenth Circuit repeated its holding that a notice of intent to readjust sent prior to the anniversary date "preserves the Department's right to readjust the terms within a reasonable time thereafter." *Id.* at 505. The facts with respect to one of the two leases involved in *Coastal States* are indistinguishable from those in the instant case. With respect to that lease, the government had provided the lessee with a notice of intent to readjust prior to the anniversary date, but had provided the precise proposed terms of readjustment shortly after the anniversary date, as in this case. *Id.* at 504. The Tenth Circuit reached the identical result with respect to both leases; the linchpin of the decision was that, as in this case, the lessee had received a notice of intent to readjust prior to the anniversary date and received the proposed terms within a reasonable time thereafter.

b. The third Tenth Circuit decision cited by petitioner, *Rosebud Coal Sales Co.* v. *Andrus*, 667 F.2d 949 (1982), provides no support for petitioner's argument, as the Tenth Circuit itself recognized in distinguishing it in the *FMC Wyoming* and *Coastal States* decisions. In *Rosebud*, the lessee received no notice of any sort concerning an intent to readjust until after passage of the FCLAA, see note 2, *supra*, two and one-half years after the twenty-year anniversary date. At that time, the Department notified the lessee that it intended to readjust the terms of the lease and raise the royalty payments in accordance with the recently enacted FCLAA. 667 F.2d at

953. As the court later explained in *FMC Wyoming*, the Tenth Circuit in *Rosebud* simply held on the "narrow" issue before it that "an attempt two and one-half years after the anniversary date to serve notice * * * of an intent to readjust is not timely." 816 F.2d at 500. Far from conflicting with the later decisions in *FMC Wyoming* and *Coastal States*, *Rosebud* "strongly suggests" the proposition that notice of intent to readjust served *before* the anniversary date *is* timely. *FMC Wyoming*, 816 F.2d at 500. *Rosebud* is thus in no way in conflict with the decision of the court of appeals below.

2. Petitioner contends (Pet. 13-22) that the lower court misapplied *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in deferring to the Secretary's interpretation. This contention too is mistaken.

a. Petitioner asserts that deference to the Secretary's interpretation of the MLA was inappropriate because the "plain meaning" of the phrase "at the end" is that the Secretary had "the opportunity to mandate new terms and conditions which would take effect with the initiation of the second period of the lease." Pet. 15. Beyond repeating the terms of the statute and insisting that they must be paraphrased to mean "before the end," see Pet. App. 20a, petitioner advances no reason why its interpretation of the statutory language is to be preferred over that embodied in the regulations or the other interpretations suggested by the court of appeals. See Pet. App. 21a.[5] Therefore, the fact that the statutory phrase

[5] Petitioner contends (Pet. 14) that the legislative history supports its interpretation. However, the legislative history cited by petitioner (Pet. 16) merely recites the phrase "at the end" in terms almost identical to those of the statute itself; it sheds no further light on the meaning of this phrase.

"at the end" is "capable of bearing other interpretations," *id.* at 20a, ineluctably leads to the court of appeals' conclusion that the Secretary's interpretation is entitled to *Chevron* deference.[6]

b. The two cases cited by petitioner on this point, *Hallstrom* v. *Tillamook*, 110 S. Ct. 304 (1989), and *United States* v. *Locke*, 471 U.S. 84 (1985), do not support petitioner's claim.

In *United States* v. *Locke*, a statute required holders of unpatented mining claims to file certain notices with the government "*prior to* December 31" of every year. 471 U.S. at 89 (emphasis added). The Court held that certain holders of such claims who filed their notices *on* December 31 had failed to comply with the statutory requirement. *Id.* at 96. In *Hallstrom*, a plaintiff brought a citizen's suit under a federal environmental protection statute without notifying the Environmental Protection Agency, despite a provision in the statute involved that "[n]o action may be commenced * * * *prior to* 60 days after the plaintiff has given notice of the violation" to the EPA. 42 U.S.C. 6972(b)(1)(A) (Supp. V 1987) (emphasis added). See 110 S. Ct. at 308. The Court held that the suit had to be dismissed because the plaintiff failed to comply with the notice provision. 110 S. Ct. at 312.

Neither *Locke* nor *Hallstrom* is of use to petitioner here. Both cases involved the interpretation of statutory terms ("prior to") different from those ("at the end of") at issue in this case. Moreover, the Secretary gave petitioner notice of his intent to readjust

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[6] The Tenth Circuit, holding that it "may not substitute its judgment for that of the agency," *Coastal States*, 816 F.2d at 505 n.5, has also deferred to the Secretary's interpretation of the statute.

prior to the twenty-year anniversary date in this case. By contrast, both the claim holders in *Locke* and the plaintiff in *Hallstrom* failed entirely to meet the statutory deadline. Finally, far from rejecting an agency's interpretation of the language in issue—as petitioners urge in this case—the *Locke* Court relied in part on the agency's regulations to reach its result, see 471 U.S. at 96, and the *Hallstrom* Court's result was in full accord with the agency interpretation. 110 S. Ct. at 312.

c. Petitioner asserts (Pet. 20-21) for the first time in this litigation that the Secretary's interpretations of the MLA's timing requirements have been inconsistent and are therefore not entitled to deference. Petitioner does not rely on any changes in the Secretary's regulations concerning coal leases over the years, but rather asserts that the coal leasing regulations are inconsistent with regulations addressing federal leases for other minerals, which provide that if the readjusted terms are not transmitted prior to the expiration of the twenty-year period, readjustment is waived. See 43 C.F.R. 3511.4(a) (phosphate), 3531.4(a) (potassium), 3551.4(a) (gilsonite).

Each of the regulations cited by petitioner is authorized by a separate statutory provision governing leasing of the particular mineral involved. See 30 U.S.C. 207 (coal), 30 U.S.C. 212 (phosphate), 30 U.S.C. 283 (potassium or potash), and 30 U.S.C. 241(a) (gilsonite). Although the term "at the end of" appears in each of the statutes, the statutory provisions vary in a number of other respects. Petitioner's argument therefore simply underscores the fact that the term "at the end of," embodied in several different statutes governing several different

leasing programs, is susceptible of differing interpretations. The Secretary may therefore adopt different approaches to interpretation of that term to govern differing leasing programs.

d. Petitioner contends (Pet. 21-22) that deference is not due to the Secretary's interpretation of the MLA's timing requirements because such requirements are "jurisdictional." Petitioner's argument is mistaken for two reasons.

First, petitioner incorrectly characterizes the MLA provision at issue in this case as "jurisdictional." It is not disputed that the Secretary has authority—and, in that sense, "jurisdiction"—to readjust the terms of mineral leases. The MLA provision at issue in this case simply embodies a procedural rule for determining when the Secretary may exercise that undisputed authority. As such, it is no more "jurisdictional" than is any statutory provision outlining substantive or procedural rules to govern a regulatory regime, and the Court has never permitted the mere invocation of the word "jurisdiction" to override the deference ordinarily due to an agency's interpretations of a statute whose administration is entrusted to it.

Second, even if a given statutory provision were correctly characterized as "jurisdictional," that fact does not in any event limit the deference due the agency's interpretation. In *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833 (1986), this Court rejected the assertion that an agency's "expertise was not deserving of deference because of the 'statutory interpretation-jurisdictional' nature of the question at issue." *Id.* at 845. The Court explained:

> An agency's expertise is superior to that of a court when a dispute centers on whether a particular regulation is 'reasonably necessary to ef-

> fectuate any of the provisions or to accomplish any of the purposes' of the Act the agency is charged with enforcing; the agency's position, in such circumstances, is therefore due substantial deference.

Ibid. See also *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in the judgment); *Dole* v. *United Steelworkers*, 110 S. Ct. 929, 944 (White, J., dissenting). Because the Secretary's interpretation of the MLA timing requirement for coal leases is "reasonably necessary to effectuate" or "accomplish any of the purposes of" the MLA, the court of appeals correctly deferred to that interpretation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1990

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* The Solicitor General is disqualified in this case.

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